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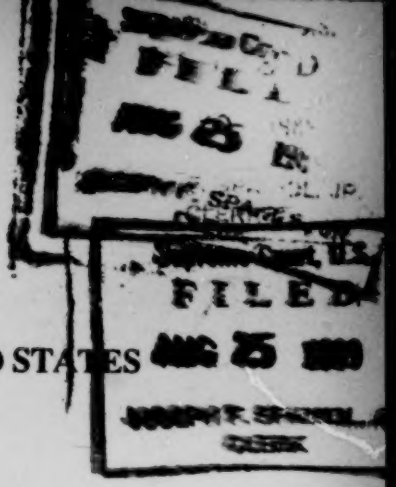

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

WELEX, A DIVISION OF HALLIBURTON COMPANY,
Petitioner,
v.
ELIZABETH DOLE, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Counsel of Record

Of Counsel:

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37 pp

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QUESTIONS PRESENTED

1. Whether the liberality of Rule 3(c), Federal Rules of Appellate Procedure, in mandating against dismissal of appeals for informality in form or title of the notice, is nullified by Rule 4(a)(4) in reviewing the efficacy of a second filing of notice of appeal.

2. Whether a motion styled in the trial court as a Rule 59 motion, but which is in substance a Rule 60(a) motion because it requests the trial court to memorialize a part of its decision that the movant believes was inadvertently omitted, should nullify a notice of appeal by operation of Rule 4(a)(4).

PARTIES

All parties to the proceeding are identified in the caption of the case. Halliburton Company is the parent of Halliburton Logging Services, Inc., successor to the Welex Division of Halliburton Company.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

WELEX, A DIVISION OF HALLIBURTON COMPANY,
Petitioner,
v.
ELIZABETH DOLE, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Welex, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on April 20, 1989, with reconsideration denied on June 2, 1989.

OPINIONS BELOW

The decisions of the United States Court of Appeals for the Fifth Circuit were made without opinions and have not been reported. These orders are reprinted in the appendix beginning at p. 26a, *infra*.

The memoranda and orders of the United States District Court for the Southern District of Texas (Hughes, D. J.) have not been reported. They are reprinted in the appendix beginning at p. 16a, *infra*.

JURISDICTION

Invoking jurisdiction under Section 17 of the Fair Labor Standards Act of 1938, 29 U.S.C. §217, Respondent brought this suit in the United States District Court for the Southern District of Texas. On November 29, 1988, the district court entered judgment against Petitioner. Petitioner appealed to the United States Court of Appeals for the Fifth Circuit, which dismissed the appeal on the grounds discussed below.

The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. §1254(1).

STATUTES

This case is based on the following statutes, the full texts of which are set forth in the appendix beginning at p. 28a, *infra*,

1. Fed. R. App. P. 3(c)
2. Fed. R. App. P. 4(a)(4)
3. Fed. R. Civ. P. 59(e)
4. Fed. R. Civ. P. 60

STATEMENT OF THE CASE

Petitioner was, at all relevant times, an enterprise engaged in commerce or in the production of goods for commerce within the meaning of §3(s) of the Fair Labor Standards Act of 1938, *as amended*, 29 U.S.C. §203(s). Respondent is the Secretary of Labor, United States Department of Labor.

In 1979, Respondent's predecessor, Raymond J. Donovan, commenced this action pursuant to Section 17 of the Fair Labor Standards Act of 1938, *as amended*, 29 U.S.C. §217. Respondent sought to enjoin Petitioner from allegedly violating §15(a)(2) of the Fair Labor Standards Act, *as amended*, 29 U.S.C. § 215(a)(2) and to restrain Petitioner from withholding payment of overtime compensation allegedly due to employees under the Act. On November 29, 1988, the district court entered judgment against Petitioner, awarding monetary relief requested by Respondent.

On December 5, 1988, Petitioner filed a Notice of Appeal to the United States Court of Appeals for the Fifth Circuit. The following day, Respondent filed a motion ostensibly seeking to alter or amend the judgment, asserting that the district court failed to address the issue of injunctive relief. On December 16, 1988, the district court denied Respondent's motion, stating that its judgment implicitly denied injunctive relief.

On December 18, 1988, Petitioner made two filings with the Clerk of the Court of Appeals. The first consisted of a letter to the Clerk

accompanied by the receipt from the United States District Court for the Southern District of Texas for the $105 appeal filing fee. In its letter, Petitioner asserts it has complied with Federal Rule of Appellate Procedure 3(e). This letter also identifies the parties, the courts appealed from and to, and the case appealed. The second consisted of a letter to the Clerk and Petitioner's Form for Appearance of Counsel which identifies Petitioner as the Appellant, Respondent as the Appellee, and the Fifth Circuit docket number.

On March 16, 1989, the Secretary of Labor moved to dismiss the appeal on the ground that Welex filed no subsequent Notice of Appeal after the Secretary had filed a Motion to Alter or Amend the Judgment. The Secretary relied on Rule 4(a)(4) of the Federal Rules of Appellate Procedure which nullifies a notice of appeal filed prior to the disposition of a timely Rule 59 motion and, thus, requires additional notice after the district court acts. The Secretary argued that the 60-day period prescribed for filing an appeal from a final district court order involving the United States as a party ended on February 14, 1989. By waiting an additional 30 days to file its motion to dismiss, the Secretary precluded Petitioner from moving under Appellate Rule 4(a)(5) for additional time in which to file notice of appeal. Petitioner filed a response to the Secretary's motion on March 31, 1989. On April 20, 1989, the United States Court of Appeals for the Fifth Circuit summarily granted the motion and dismissed Welex's appeal. On May 3, 1989, Petitioner filed a Motion for Reconsideration of the dismissal, asserting that the documents filed with the Clerk of the Court of Appeals on December 18, 1988, constituted a valid and timely notice of appeal. On June 2, 1989, Petitioner's motion was summarily denied.

Petitioner seeks review of the Fifth Circuit's disposition of the issues presented in both its response to the Secretary's Motion to Dismiss the Appeal and its Motion for Reconsideration. Specifically, Petitioner seeks review of: (1) The Fifth Circuit's restrictive application of Federal Rule of Appellate Procedure 3(c) whenever an intervening motion has voided a prior appeal by application of Federal Rule of Appellate Procedure 4(a)(4); and (2) The Fifth Circuit's failure to characterize properly the Secretary's motion styled Rule 59(e) as a Rule 60(a) motion where the motion sought relief nunc pro tunc for the trial court's failure to memorialize part of its decision. The Secretary's motion, if properly characterized, would not invalidate the earlier notice of appeal.

REASONS FOR GRANTING THE WRIT

It is "too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities." *Foman v. Davis*, 371 U.S. 178, 181 (1962). More recently this court held that "the technical requirements for a notice of appeal were not mandatory where the notice did not mislead or prejudice." *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 387 (1978) (per curiam). The Fifth Circuit's rejection of Petitioner's filings as constituting adequate notice of appeal, in the context of an earlier notice being nullified by Rule 4(a)(4), is contrary to the admonition of Rule 3(c) that appeals should not be dismissed for "informality of form or title of the notice of appeal." Moreover, the substance of the motion filed in the district court must control over form. Here, the substance dictated the application of Rule 60(a), not Rule 59. The issue is important to the administration of justice for all litigants who otherwise suffer the harsh consequences of Appellate Rule 4(a)(4) whenever a motion has been mischaracterized in a manner that will trigger the rule.

I.
THE FIFTH CIRCUIT'S STRICT APPLICATION OF FEDERAL RULE OF APPELLATE PROCEDURE 3(c) WHERE RULE 4(a)(4) HAS BEEN INVOKED IS CONTRARY TO THE LIBERAL STANDARD OF THE RULE

In 1979 Rule 3(c) was amended to provide that "an appeal shall not be dismissed for informality of form or title of the notice of appeal." This change reflected the previous holdings of cases that the substance of a notice was more important than the form provided that the intention to appeal had been indicated. The notes to this amendment explain that the change was made in order to permit a court liberal discretion so that appeals would not be lost by "mistakes of mere form":

> **Note to Subdivision (c).** The proposed amendment would add the last sentence. Because of the fact that the timely filing of the notice of appeal has been characterized as jurisdictional (*see, e.g., Brainerd v. Beal* (CA 7th, 1974) 498 F.2d 901, in which the filing of notice of appeal one day late was fatal), it is important that the right to appeal not be lost by mistakes of mere form. In a number of decided cases it has been held that so long as the function of notice is met by the filing of a paper

> indicating an intention to appeal, the substance of the rule has been complied with. See, e.g., *Cobb v. Lewis* (CA 5th, 1974) 488 F.2d 41; *Holley v. Capps* (CA 5th, 1972) 468 F.2d 1366. The proposed amendment would give recognition to this practice.

Fed. R. App. P. 3, note to Subdivision (c).

Rule 4(a)(4) provides that a notice of appeal filed prior to a district court's disposition of a timely motion to alter or amend a judgment is ineffective to invoke appellate jurisdiction; a party seeking to preserve the opportunity to appeal a judgment must file a new notice of appeal after disposition of the motion to alter or amend. *See Griggs v. Provident Consumer Discount*, 459 U.S. 56, 58-61 (1982). In evaluating the substance and nature of a subsequent appeal where Rule 4(a)(4) has been implicated, the Fifth Circuit has abandoned the liberal standard suggested by Rule 3(c). There is nothing in the history of either rule to support the notion that Rule 4(a)(4) was intended to tighten the standard of Rule 3(c).

From the summary dismissal here, without opinion, one must infer that the court below followed its precedent in cases involving Rule 4(a)(4). This precedent is exemplified by the decision in *Van Wyk El Paso Investments, Inc. v. Dollar Rent-A-Car Systems, Inc.*, 719 F.2d 806, 807-08 (5th Cir. 1983) and its progeny, *Greater Houston Chapter of the American Civil Liberties Union v. Eckels*, 763 F.2d 180, 181 (5th Cir.), *cert. denied*, 474 U.S. 980 (1985), *Alamo Chemical Transportation co. v. M/V Overseas Valdes*, 744 F.2d 22, 23-24 (5th Cir. 1984). In *Van Wyk*, the court rejected appellant's contention that adequate notice of appeal was given after entry of an order denying a Rule 59 motion where the filings included a Form of Appearance for Counsel, the district court's record of filing the transcript with the appellate court, the court's record of receipt and filing of the transcript, and a letter from the clerk of the court transmitting the original record to counsel. The prejudice to the appellant, in having filed an earlier notice of appeal which was nullified by Rule 4(a)(4), occurred because the Fifth Circuit read the new documents " . . . as no more than steps in the perfection of the prematurely noticed appeal." 719 F.2d at 807. Had there been no prior notice of appeal, this rationale would not apply. The Fifth Circuit departed from the more liberal standards applied in cases where Rule 4(a)(4) was not implicated, citing *Cobb v. Lewis*, 488 F.2d 41 (5th Cir. 1974) and *Stevens v. Heard*, 674 F.2d 320 (5th Cir. 1982) as its own

examples of liberality where Rule 4(a)(4) was not applicable. This dichotomy is seen in various cases predating Rule 4(a)(4) where the notice requirements were equitably applied to allow appeals. *E.g., Crump v. Hill*, 104 F.2d 36, 37-38 (5th Cir 1939) ("[W]e think that the appellant, when he procured from appellee and filed, her waiver of notice, her acceptance of designation, and her entry of appearance, just as effectively started his appeal as if he had merely filed the notice of appeal . . . ."); *Des Isles v. Evans*, 225 F.2d 235 (5th Cir. 1955) (application for leave to appeal *in forma pauperis* equivalent to a notice of appeal); *Carter v. Campbell*, 285 F.2d 68 (5th Cir. 1960) (application for leave to proceed upon the original record constituted adequate notice of appeal).

The United States Court of Appeals for the District of Columbia Circuit has taken a different view in a similar context. In *Nichols v. Asbestos Workers' Local 24 Pension Plan*, 835 F.2d 881 (D.C. Cir. 1987) although a notice of appeal had been filed before the district court ruled on a motion for reconsideration, this deficiency was cured by the timely filing, after the disposition of the motion, of a Rule 10(b)(1) certificate. While Rule 4(a)(4) was invoked to invalidate an earlier notice of appeal, the certificate notifying the court that a transcript of the district court proceedings would not be ordered for use on appeal was deemed adequate, and not merely a "step in the perfection of a premature notice." No prejudice to the appellant resulted from the fact of an earlier notice when the court evaluated the efficacy of the later filing.

Although Federal Appellate Rule 4(a)(4) provides that the filing of a timely motion under Civil Rule 59(e) tolls the period for appeal until a district court rules on the motion, and that a notice of appeal filed in the meantime shall have no effect, there is no language in the statute suggesting that a different standard for Rule 3 will apply whenever Rule 4(a)(4) has been activated. Nor is there any conceivable policy reason why a stricter standard should apply to subsequent notices. A prospective appellee can hardly claim surprise by having received actual notice twice, though the first may have been nullified for administrative reasons under the rules of procedure. This is especially true where, as here, the motion to amend, which nullified the first notice, was denied and there is no reason to believe the subsequent appeal is any different from the first. In this situation, all parties are cognizant of the fact that the second appeal will remain the same in substance. Moreover, here the form for appearance of counsel specifically designated Welex, a

Division of Halliburton Company as the Appellant and names the court to which the appeal is taken. This was supplemented by two letters filed with the Court of Appeals, both of which identify the district court case number being appealed, and one of which specified the court as the "Victoria Division of the U. S. District Court." This designation could only refer to the single judgment entered in the two party case. There was actual, timely notice to both courts and to the appellee, and there is no room for a claim of prejudice.

The error below is not academic, but has serious consequences to every litigant faced with a denial of its appeal. The failure to accord Rule 3(c) the liberality it mandates — on the premise that the subsequent filings may be read as mere steps perfecting the nullified notice of appeal — invites parties to file Rule 59 motions whenever there has been a judgment in the trial court from which the opposing party might appeal. The motion, regardless of merit, will be merely one more snare in the pathway of appeal. This is not the approach mandated by this Court. *See Foman v. Davis*, 371 U.S. 178, 181 (1962).

II.
IN FAILING TO CHARACTERIZE PROPERLY THE SECRETARY OF LABOR'S MOTION IN THE DISTRICT COURT AS A RULE 60(a) MOTION, THE FIFTH CIRCUIT HAS SUBVERTED SUBSTANCE FOR FORM CONTRARY TO THE SPIRIT OF THE FEDERAL RULES OF CIVIL PROCEDURE

Only motions filed under Federal Civil Procedure Rules 50(b), 52(b), and 59 to alter or amend judgments or for a new trial nullify a notice of appeal by operation of Appellate Rule 4(a)(4). The phrase "alter or amend" means a substantive change of mind by the court. *Boaz v. Mutual Life Insurance Company of New York*, 146 F.2d 321 (8th Cir. 1944) (cited in Rule 59(e) advisory committee note); *see also White v. New Hampshire Department of Employment Security*, 455 U.S. 445, 450-51 (1982).

A motion to correct clerical errors and mistakes is a Rule 60(a) motion and does not void a previously filed notice of appeal under Rule 4(a)(4). A court's failure to memorialize part of its decision is a clerical error. *Miller v. Trans-American Press Inc.*, 709 F.2d 524 (9th Cir. 1983). In *Miller*, a postjudgment motion styled as a Rule 59(e) motion to alter or amend was properly recharacterized by the court as a

Rule 60(a) motion resulting in the inapplicability of Rule 4(a)(4). The motion was a Rule 60(a) motion because the movant had sought to include a ruling for relief which he believed the court had overlooked. The trial court's order addressing the motion confirmed this view by stating, "amended to reflect that the court denied defendants' motion for sanctions." *Miller*, at 526. The court of appeals agreed that the request for additional relief was subsumed in the original order, and the subsequent clarification by the court was an entry nunc pro tunc reflecting that the request was denied by the earlier order. Rule 60(a), and not Rule 59(e) applied because the district court's response was to conform the written judgment to the partly tacit intention of the earlier ruling.

This is precisely what happened in the case at hand. In the original complaint, the Secretary of Labor asked the court to permanently enjoin Defendant from violating the Fair Labor Standards Act. In the Memorandum in Support of the Secretary's Motion to Alter and Amend Judgment it was argued that in the Pretrial Order entered on November 10, 1988, "the court acknowledged that this is an action by the Secretary of Labor to enjoin Defendant from violating the provision of Section 15(a)(2) of the Fair Labor Standards Act, and to restrain Defendant from withholding payment of overtime compensation found by the court to be due the employees under the Act". In that same memorandum, the Secretary pointed out that Section 17 of the Fair Labor Standards Act (29 U.S.C. §217) "expressly provides the force of an equitable remedy which operates dirctly (sic) againt (sic) the defendant employer and is enforceable through the use of the court's contempt power." The memorandum clearly communicates the Secretary's belief that the court failed to memorialize the injunctive part of the decision.

The district court's order ruling on the motion states, "The granting of only the compensatory monetary relief in the final judgment implicitly but unequivocally denied the other relief the Secretary of Labor requested; therefore, no amendment to the judgment is needed." *Miller* and the case at hand are indistinguishable on this point. The Secretary's motion and the court's response demonstrate that the substance of the matter was governed by Rule 60(a).

While a "bright line rule" has been developed to treat Rule 60(b) motions filed within ten days of judgment the same as a Rule 59(e)

motion, that test does not apply to Rule 60(a) motions. *Harcon Barge Co., Inc. v. D & G Boat Rentals, Inc.*, 784 F.2d 665 (5th Cir.), *cert. denied*, 479 U.S. 930 (1986).

The proper characterization of the motion in the case at hand is not academic — it is decisive of the issue whether the harsh results of Rule 4(a)(4) will occur or whether Petitioner and others similarly situated will have their appeals heard. The district court's ruling that "the final judgment implicitly but unequivocally denied the other relief," especially in the context of the Secretary's own view that the relief must have been overlooked, falls squarely in the scope of Rule 60(a) and the reasoning of *Miller v. Trans-American Press Inc., supra*. The grievous error with its dire consequences here, but which were avoided in *Miller*, exalts form over substance and contradicts the notion that the rules of procedure are to serve the ends of justice and not deny them. No explanation for this harsh treatment is given by the court below, but the record is clear and unequivocal, and the trial judge's own words best characterize the substance of what occurred before him — that the Secretary's request was subsumed by the original order and that the court's ruling was an entry nunc pro tunc that the original order unequivocally denied the relief. This Court's supervision is required to give proper guidance in the unique circumstances of this case.

CONCLUSION

For these reasons, this Petition for a Writ of Certiorari should be granted. This matter should be remanded to the Court of Appeals as a stricter standard does not exist for evaluating the validity of a notice of appeal in the context of Rule 4(a)(4). Furthermore, as the Secretary's motion in the district court was a Rule 60(a) motion, it did not nullify Petitioner's initial notice of appeal. The appeal was timely and should not have been dismissed.

Respectfully submitted,

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APPENDIX

DC 111A
(Rev. 1/75)

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	CA. V-79-19
ANN MCLAUGHLIN,		docket no. ___
~~RAYMOND J. DONOVAN,~~		
SECRETARY OF LABOR	WELEX	page 5 of ___ pages

DATE	NR.	PROCEEDINGS
10-24-88	60	(LNH) ORDER, dd 10-18-88, filed. parties ntfd. by cert. mail RRR. mg 1. case set for trial in Houston, Tx. before Judge Lynn N. Hugheson 11-22-88 @ 9:00 am; 2. Joint pretrial order - due 11-7-88 Dkt'd 10-24-88/mg
11-02-88	61	Pltf's NOTICE OF SUBSTITUTION of Ann McLaughlin as Secretary of labor, filed. Dkt'd 11-03-88/mg
11-02-88	—	orig. depos. ret to orig. file. rr Dkt'd 11-03-88/mg dup.
11-03-88	—	file w/orig. depos. fwd to Judge Hughes' case manager, Mary Gage. mg (Depos: #15, 18, 19, 20, 36, 37 & 48 (two).
11-10-88	62	PRETRIAL ORDER, filed. mg A. Pltf's Proposed Findings of Fact & Conclusions of law.
11-21-88	63	Pltf's TRIAL BRIEF, filed. mg
11-22-88	—	received Deft's Findings of Fact and Conclusions of Law & fwd to Case Mgr Mary Gage for Judge Hughes. mg
11-29-88	64	(LNH) Nov 22, 1988 COURTROOM MINUTES, HOUSTON, TEXAS, filed. mg 9:45/12:00 Noon. Court Reporter: H. Chester. Appearances: Pltf - Robert Fitz Deft - John Smither BENCH TRIAL: Evidence presented. Court rules for Pltf. Dkt'd 11-29-88/mg
	65	(LNH) FINAL JUDGMENT, dd 11-22-88, filed. parties ntfd. mg

Pltf. recover from Deft Welex f/benefit of 91 employees in class covered by period 10-1-77 - 1-31-80:
a. $102,662.47 in principal;
b. $82,365.59 in prejudgment int. from 1-1-80 @ 9% per annum;
c. postjudgment interest at 8.55% per annum.
Dkt'd 11-29-88/mg

12-02-88 —dup. file w/orig. depos. #15, 18, 19, 20, 36, 37 & 48(2). returned to orig. file in Victoria Division. mg

12-05-88 66 Deft Welex's MOTION FOR STAY OF JUDGMENT PENDING APPEAL, filed. mg (unopposed)

67 Deft Welex's MOTION FOR APPROVAL OF SUPERSEDEAS BOND, filed. mg (unopposed)

— rcd Deft's Supersedeas Bond with Order thereon. mg

68Deft Welex's NOTICE OF APPEAL from Final Judgment entered 11-29-88, filed. parties ntfd.

DC 111A
(Rev. 1/75)

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	CA. V-79-19
ANN MCLAUGHLIN, SECRETARY OF LABOR U. S. DEPARTMENT OF LABOR	WELEX, A DIVISION OF HALLIBURTON CORPORATION	docket no. ___

DATE	NR.	PROCEEDINGS
12-06-88	69	Pltf's MOTION TO ALTER AND AMEND JUDGMENT, filed. mg (opposed) M/D 12-26-88
	70	Pltf's MEMORANDUM IN SUPPORT of Motion to Alter and Amend Judgment, filed. mg
12-07-88	71	(LNH) ORDER, dd 12-2-88, filed. parties ntfd. mg Enforcement of judgment entered 11-29-88 STAYED pending termination of Welex's appeal to 5th Cir. Court of Appeals. Dkt'd 12-07-88/mg
12-13-88	72	Deft's REPLY to Pltf's Motion to Alter and Amend Judgment, filed. mg
12-14-88	73	SUPERSEDEAS BOND for $200,000.00 in behalf of Deft. Welex (Highlands Insurance Company, Houston, TX), filed. Approved by LNH 12-11-88. Dkt'd 12-14-88/mg
12-16-88	74	(LNH) MEMORANDUM, dd 12-13-88, filed. parties ntfd. mg In granting only compensatory monetary relief in judgment, other relief requested by Sec. of Labor denied. Dkt'd 12-16-88/mg
	75	(LNH) ORDER, dd 12-13-88, filed. parties ntfd. mg Pltf Secretary of Labor's motion to amend judgment DENIED. Dkt'd 12-16-88/mg

01-03-89	76	DEPOSITION of Sammy Eugene Ray of U. S. Dept. of Labor, Employment Standards Administration, Wage and Hour Division, filed. mg
02-08-89		—rcd transcript of 11-22-88 trial from Court Reporter & fwd to Victoria Div. le Dkt'd 02-13-89/mg
02-13-89	77	TRANSCRIPT OF TRIAL ON NOV. 22, 1988 before Hon. Lynn N. Hughes in Houston, Tx, filed. mg
02-14-89	—	-fwd Record on Appeal to 5th Cir. Court of Appeals. mg (4 vol. record, 9 Depos., 7 vol. exhibits)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

ANN McLAUGHLIN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,	§	
Plaintiff,	§	
v.	§	**Civil Action No. V-79-19**
WELEX, A DIVISION OF HALLIBURTON CORPORATION,	§	
Defendants.	§	

NOTICE OF APPEAL

Notice is hereby given that Welex, a division of Halliburton Company, the Defendant above-named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment entered in this action on November 29, 1988.

Dated December 2, 1988.

Respectfully submitted,

/s/ John H. Smither

JOHN H. SMITHER
Attorney in Charge
I.D. No. 3626
THOMAS H. WILSON
Of Counsel
I.D. No. 6585
2901 First City Tower
1001 Fannin

OF COUNSEL:

VINSON & ELKINS
3300 First City Tower
1001 Fannin
Houston, Texas 77002-6760

Houston, Texas 77002-6760
(713) 651-2466

Attorneys for Welex,
A Division of Halliburton
Company

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of December, 1988, a copy of the foregoing Motion for Stay of Judgment Pending Appeal, Order, Motion for Approval of Supersedeas Bond, Supersedeas Bond, and Notice of Appeal was served on all concerned parties hereto by placing same in the United States mail, certified mail, return receipt requested, with proper postage affixed and addressed as follows:

Mr. Robert A. Fitz, Attorney
U.S. Department of Labor
Office of the Solicitor
525 South Griffin Street, Suite 501
Dallas, Texas 75202

/s/ John H. Smither

ATTORNEY FOR DEFENDANT

704:3349

welex\dol\204

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

ANN MCLAUGHLIN, Secretary of Labor, United States Department of Labor,	)	
Plaintiff,	)	**Civil Action**
v.	)	**No. V-79-19**
WELEX, a division of HALLIBURTON CORPORATION,	)	
Defendant.	)	

PLAINTIFF'S MOTION TO ALTER AND AMEND JUDGMENT

Comes now plaintiff pursuant to Rule 59(e) of the Federal Rules of Civil Procedure and Local Rule 6 and moves to alter and amend the judgment entered herein on June 13, 1988, from a money judgment at law to an injunction in equity. In support of this motion, plaintiff would show that this is an action in equity rather than an action at law, and that plaintiff is entitled to permanent injunctive relief in addition to restitutionary injunctive relief.

GEORGE R. SALEM
Solicitor of Labor

JAMES E. WHITE
Regional Solicitor

ADDRESS:

Office of the Solicitor
U. S. Department of Labor
525 Griffin Street, Suite 501
Dallas, Texas 75202
Telephone: 214/767-4902

Case No. 08750

BOBBIE J. GANNAWAY
Counsel for Employment
Standards

/s/ Robert A. Fitz
ROBERT A. FITZ
Attorney-in-Charge
Attorneys for Plaintiff.

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of December, 1988, one copy each of plaintiff's motion to alter and amend judgment, memorandum in support, and proposed order were served upon defendant by mailing them in an envelope addressed to Mr. John H. Smither, Vinson & Elkins, 1001 Fannin Street, Suite 3300, Houston, Texas 77002.

/s/ Robert A. Fitz
ROBERT A. FITZ
Attorney

CERTIFICATE OF CONFERENCE

I hereby certify that on the 2nd day of December, 1988, I conferred with John H. Smither, attorney for defendant, about the disposition of plaintiff's contemplated motion to alter and amend judgment, but that we could not agree about the disposition of this motion.

/s/ Robert A. Fitz
ROBERT A. FITZ
Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

ANN MCLAUGHLIN, Secretary of Labor, United States Department of Labor,	)	
Plaintiff,	)	**Civil Action**
v.	)	**No. V-79-19**
WELEX, a division of HALLIBURTON CORPORATION,	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO ALTER AND AMEND JUDGMENT

Statement

Plaintiff has moved to alter and amend the judgment entered herein on June 13 1988, from a money judgment at law to an injunction in equity. This memorandum is submitted in support of plaintiff's motion.

Applicable Rule of Federal Civil Procedure

Rule 59(e) of the Federal Rules of Civil Procedure provides that:

> A motion to alter or amend the judgment shall be served no later than 10 days after entry of the judgment.

Argument

This action is an action in equity under Section 17 of the Fair Labor Standards Act (29 U.S.C. 217) to enjoin defendant from violating the provisions of section 15(a)(2) of the Act (29 U.S.C. 215(a)(2)) and to restrain defendant from withholding payment of overtime compensation found by the court to be due employees under the Act.

Consequently, in the complaint filed herein on September 17, 1979, plaintiff prayed for judgment permanently enjoining defendant, its officers, agents, servants, employees and all those persons in active concert or participation with it from violating the provisions of Sections 7 and 15(a)(2) of the Fair Labor Standards Act (29 U.S.C. 207 and 215(a)(2)), and such other and further relief as may be necessary and appropriate, including the restraint of withholding of payment of overtime compensation found by the court to be due employees under the Act together with interest thereon at the rate of nine percent per annum from the date such back wages became due until paid. Likewise, in the pre-trial order entered herein on November 10, 1988, the court acknowledged that this is an action by the Secretary of Labor to enjoin defendant from violating the provisions of Section 15(a)(2) of the Fair Labor Standards Act, and to restrain defendant from withholding payment of overtime compensation found by the court to be due to employees under the Act, that jurisdiction of this action is conferred upon the court by Section 17 of the Act (29 U.S.C. 217), and that the following issues of law are contested:

> 1. Whether the violations, if any, of the overtime compensation requirements of Sections 7(a) and 15(a)(2) of the Act (29 U.S.C. 207(a) and 215(a)(2)) by defendant were willful?
> 2. Whether defendant should be enjoined permanently from violating the overtime compensation requirements of Sections 7(a) and 15(a)(2) of the Act. (29 U.S.C. 207(a) and 215(a)(2))?
> 3. Whether defendant should be restrained from continuing to withhold payment of overtime compensation found to be due to its employees together with interest thereon from the date such overtime compensation became due until paid.

After the trial on November 22, 1988, the court concluded that the violations of the overtime compensation requirements of the Act were not willful. However, the judgment entered herein on November 29, 1988, did not address the issue of whether defendant should be enjoined permanently from violating the overtime compensation requirements of the Act, and it awarded plaintiff a money judgment rather than a restitutionary injunction.

Plaintiff's prayer for judgment permanently enjoining defendant from violating the overtime compensation requirements of

Sections 7(a) and 15(a)(2) of the Act re... viable. In an amended judgment, the court should enjoin defendant permanently from violating the overtime compensation requirements of Sections 7(a) and 15(a)(2) of the Act. Dunlop v. Ledet's Foodliner of LaRose, Inc., 509 F.2d 1387, 1389 (5th Cir. 1975); Donovan v. Brown Equipment and Service Tools, Inc., 666 F.2d 148 (5th Cir. 1982).

By entering a money judgment, the court in effect denied the restitutionary injunctive relief to which the Secretary of Labor is entitled. Section 17 of the Fair Labor Standards Act (29 U.S.C. 217) expressly provides the force of an equitable remedy which operates directly against the defendant employer and is enforceable through the use of the court's contempt power. Donovan v. Varkonyi, 703 F.2d 555, 96 BNA Labor Cases 34,355 (5th Cir. 1983), certiorari denied 464 U.S. 849, 104 S.Ct. 157, 78 Led.2d 145 (1983), rehearing denied 464 U.S. 1004, 104 S.Ct. 516, 78 L.Ed.2d 702 (1983); Donovan v. Brown Equipment and Service Tools, Inc., supra.

Conclusion

Plaintiff's motion to alter or amend judgment should be granted.

GEORGE R. SALEM
Solicitor of Labor

JAMES E. WHITE
Regional Solicitor

BOBBIE J. GANNAWAY
Counsel for Employment Standards

ADDRESS:

Office of the Solicitor
U. S. Department of Labor
525 Griffin Street, Suite 501
Dallas, Texas 75202
Telephone: 214/767-4902

/s/ Robert A. Fitz
ROBERT A. FITZ
Attorney-in-Charge

Attorneys for Plaintiff.

Case No. 08750

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

ANN MCLAUGHLIN, Secretary of Labor, United States Department of Labor,	)	
Plaintiff,	)	**Civil Action**
v.	)	
WELEX, a division of HALLIBURTON CORPORATION,	)	**No. V-79-19**
Defendant.	)	

ORDER

Plaintiff's motion to alter and amend judgment having come on for consideration; and it appearing to the court that this is an action in equity rather than an action at law and that plaintiff is entitled to permanent injunctive relief in addition to restitutionary injunctive relief; it is therefore

ORDERED that plaintiff's motion to alter and amend judgment be, and it hereby is, granted, and it is further

ORDERED that plaintiff shall submit to the court a form of judgment within twenty (20) days from the date of entry of this order.

SIGNED this _____ day of December, 1988.

LYNN N. HUGHES
United States District Judge

201e

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
DEC 16 1988
JESSE E. CLARK, CLERK
BY DEPUTY:
/s/ M. Gammon

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

ANN McLAUGHLIN,	§	
Secretary of Labor,	§	
Plaintiff,	§	
vs.	§	**CIVIL ACTION**
	§	**NO. V-79-19**
	§	
WELEX,	§	
	§	
Defendant.	§	

ORDER

The motion of the Secretary of Labor to amend the judgment is denied.

Signed on December 13, 1988, at Houston, Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

201c

RECEIVED
DEC 19 1988
J.H.S.

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
DEC 16 1988
JESSE E. CLARK, CLERK
BY DEPUTY:
/s/ M. Gammon

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

ANN McLAUGHLIN,	§	
Secretary of Labor,	§	
	§	
Plaintiff,	§	
	§	
vs.	§	**CIVIL ACTION**
	§	**NO. V-79-19**
	§	
WELEX,	§	
Defendant.	§	

MEMORANDUM

The granting of only the compensatory monetary relief in the final judgment implicitly but unequivocally denied the other relief the Secretary of Labor requested; therefore, no amendment to the judgment is needed. The injunctive relief was unsupported by any evidence of current practices or intentions.

The motion will be denied.

Signed on December 13, 1988, at Houston, Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

201d

December 13, 1988

By Certified Mail

Mr. Gilbert F. Ganucheau
U.S. Circuit Court Clerk
U.S. Court of Appeals for the
Fifth Circuit
600 Camp Street
New Orleans, LA 70130

Re: Ann McLaughlin, Secretary of Labor, United States Department of Labor v. Welex, A Division of Halliburton Corporation; Civil Action No. V-79-19

Dear Mr. Ganucheau:

Enclosed please find a receipt from the Victoria Division of the U. S. District Court acknowledging that we have paid the $105.00 as required by the Court. This letter serves as notice that we have complied with FRAP 3(e).

Very truly yours,

/s/ Johh H. Smither

John H. Smither
VINSON & ELKINS
2901 First City Tower
1001 Fannin
Houston, Texas 77002-6760
(713) 651-2466

704:3349
\welex\dol\108
Enclosure
cc: Mr. Robert A. Fitz, Attorney
U.S. Department of Labor
Office of the Solicitor
525 South Griffin St., Suite 501
Dallas, Texas 75202

Certified Mail
Return Receipt
Requested

Original green cards sent to Clerk w/ Response dated: 5/3/89

1. ☐ Show to whom delivered, date, and addressee's address.

2. ☐ Restricted Delivery.

3. Article Addressed to:

Gilbert F. Ganucheau
U.S. Circuit Court Clerk
U.S. Court of Appeals
for 5th Circuit
600 Camp Street
Orleans, LA 70130

4. Article Number
P 818 808 428

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5. Signature - Address

6. Signature - Agent /s/ Jewell B. Albrect

7. Date of Delivery DEC 18 1988

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201b

December 13, 1988

By Certified Mail

Mr. Gilbert F. Ganucheau
U.S. Circuit Court Clerk
U.S. Court of Appeals for the
Fifth Circuit
600 Camp Street
New Orleans, LA 70130

R e : 88-6167 - McLaughlin v. Welex
(DC No. CA V-79-19)

Dear Mr. Ganucheau:

Enclosed please find our Form for Appearance of Counsel in the above-referenced case.

By copy of this letter land the Form, counsel for Plaintiff has been served with the same, as indicated below.

Very truly yours,

/s/ John H. Smither

John H. Smither
VINSON & ELKINS
2901 First City Tower
1001 Fannin
Houston, Texas 77002-6760
(713) 651-2466

704:3349
\welex\dol\109
Enclosure
cc: Mr. Robert A. Fitz, Attorney
U.S. Department of Labor
Office of the Solicitor
525 South Griffin St., Suite 501
Dallas, Texas 75202

Certified Mail
Return Receipt
Requested

FORM FOR APPEARANCE OF COUNSEL

Only attorneys admitted to the Bar of this Court may sign this form and practice before the Court.
All attorneys admitted to the Former Fifth Circuit must qualify for admission to the New Fifth Circuit.
An application for admission is incorporated herein.
Two persons from the same organization or firm may sign this form

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 88-6167

Welex, a Division of Halliburton Company (Petitioner or Appellant) vs. McLaughlin, Secretary of Labor (Respondent or Appellee)

The Clerk will enter my/our appearance as Counsel for Welex, a Division of Halliburton Company
(Please list names of all parties represented)

Petitioner(s) Respondent(s) Amicus Curiae
who IN THIS COURT is X Appellant(s) _ Appellee(s) _ Intervenor
I certify that I am a member of the Bar of the Fifth Circuit Court of Appeals, or application for admission is being made below.

/s/ John H. Smither (Signature)

John H. Smither (Type or Print Name)

Social Security No. 451-66-5634

/s/ Thomas H. Wilson (Signature)

Thomas H. Wilson (Type of Print Name)

Social Security No. 504-90-9044

STREET Address Vinson & Elkins, 1001 Fannin, Suite 2901
City & State Houston, Texas Zip 77002 Phone (713) 651-2466

Name of Lead Counsel (Type or Print) John H. Smither

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
APPLICATION AND OATH FOR ADMISSION.
600 Camp Street, New Orleans, LA 70130
NAME: _____
(Last) (First) (Middle)

FIRM OR AGENCY:
STREET Address
City & State _____ Zip _____
Phone ( ) _____ Social Security No. _____

ADMISSION FEES:
FEE DATA:(Check One) ___Cash ___Check ___Court Apptd.
___U.S.Counsel
CASE NUMBER (If Any): _____
(Attach Admission Check Here) DKT-5(Rev.3/84)
CONTINUED ON REVERSE SIDE

A. Name of any Circuit Judge of the Fifth Circuit who participated in this case in the district or bankruptcy court

None

B. Inquiry of Counsel:

To your knowledge and that of your co-counsel from whom you are to make inquiry:

(1) Is there any case now pending in this Court, which involves the same, substantially the same, similar or related issues(s)?

Yes ___ No X

(2) Is there any such case now pending in a District Court (i) within this Circuit, or (ii) in a Federal Administrative Agency which would likely be appealed to the Fifth Circuit?

Yes ___ No _X_

(3) Is there any case such as (1) or (2) in which judgment or order has been entered and the case is on its way to this Court by appeal, petition to enforce review, deny?

Yes ___ No _X_

(4) Does this case qualify for calendaring priority under Local Rule 47.7? If so, cite type of case
No

If answer to (1), or (2), or (3) is yes, please give detailed information.
Number and Style of Related Case _____
Name of Court or Agency _____
Status of Appeal (if any) _____
Other Status (if not appealed) _____
NOTE: Attach sheet to give further details

APPLICATION: I, _____,
do hereby make application for admission to the Bar of the United States Court of Appeals for the Fifth Circuit. My personal statement showing my eligibility for membership is as follows: I am admitted to practice in the following court or courts:
OATH: I, _____, do solemnly swear that I will

demean myself as an attorney and counselor of this Court, uprightly and according to law; and that I will support the Constitution of the United States.

_____
Signature of Applicant

Subscribed and sworn to before me a Notary Public in and for the _____of _____, State of _____ this ___ day of _____ 19__.

_____
Signature of Notary

MOTION: I, _____ a member of the Bar of this Court, do hereby move for admission of the above attorney.

_____
Signature

Admitted this _____ day of _____. 19_____.

GILBERT F. GANUCHEAU,
CLERK
United States Court of Appeals

By _____
Deputy Clerk

201h

Original green cards sent to Clerk w/ Response dated: 5/3/89

1.☐ Show to whom delivered, date, and addressee's address.

2.☐ Restricted Delivery.

3. Article Addressed to:

Gilbert F. Ganucheau
U.S. Circuit Court Clerk
U.S. Court of Appeals
for 5th Circuit
600 Camp Street
Orleans, LA 70130

4. Article Number
P 818 808 429

Type of Service:
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_x_ Certified
___ Express Mail
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for Merchandise

5. Signature - Address

6. Signature - Agent /s/ Jewell B. Albrect

7. Date of Delivery DEC 18 1988

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201a

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
APR 20 1989
GILBERT F.
GANUCHEAU
CLERK

No. 88-6167

ANN McLAUGHLIN,
Secretary of Labor,
United States Department of Labor,

RECEIVED
APR 24 1989
J.H.S.

Plaintiff-Appellee,

versus

WELEX, A Division of
Halliburton Corporation,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

---

Before REAVLEY, JONES and DUHE, Circuit Judges.

BY THE COURT:

IT IS ORDERED that motion of appellee to dismiss the appeal is GRANTED.

IT IS FURTHER ORDERED that the motion of appellee to suspend this Court's briefing schedule pending this Court's ruling on appellee's motion to dismiss is MOOT.

201g

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
JUN - 2 1989
GILBERT F. GANUCHEAU
CLERK

No. 88-6167

ELIZABETH DOLE, Secretary of Labor,
United States Department of Labor,

Plaintiff-Appellee,

versus

WELEX, A Division of
Halliburton Corporation,

Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Texas

Before REAVLEY, JONES and DUHE, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellant's motion for reconsideration of this Court's order of April 20, 1989 dismissing the referenced appeal is DENIED.

IT IS FURTHER ORDERED that appellant's alternative motion for recall and stay of this Court's mandate pending its application for writ of certiorari is GRANTED.

CLERK'S NOTE: MANDATE STAYED TO AND INCLUDING AUGUST 31, 1989.

201f

STATUTES

1. Fed. R. App. P. 3(c)

> **(c) Content of the Notice of Appeal.** The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

2. Fed. R. App. P. 4(a)(4)

> (4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

3. Fed. R. Civ. P. 59(e)

> **(e) Motion to Alter or Amend a Judgment.** A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

4. Fed. R. Civ. P. 60

> **(a) Clerical Mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceedings, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Supreme Court, U.S.
FILED
OCT 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-323

In the Supreme Court of the United States

OCTOBER TERM, 1989

WELEX, A DIVISION OF HALLIBURTON COMPANY, PETITIONER

v.

ELIZABETH DOLE, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

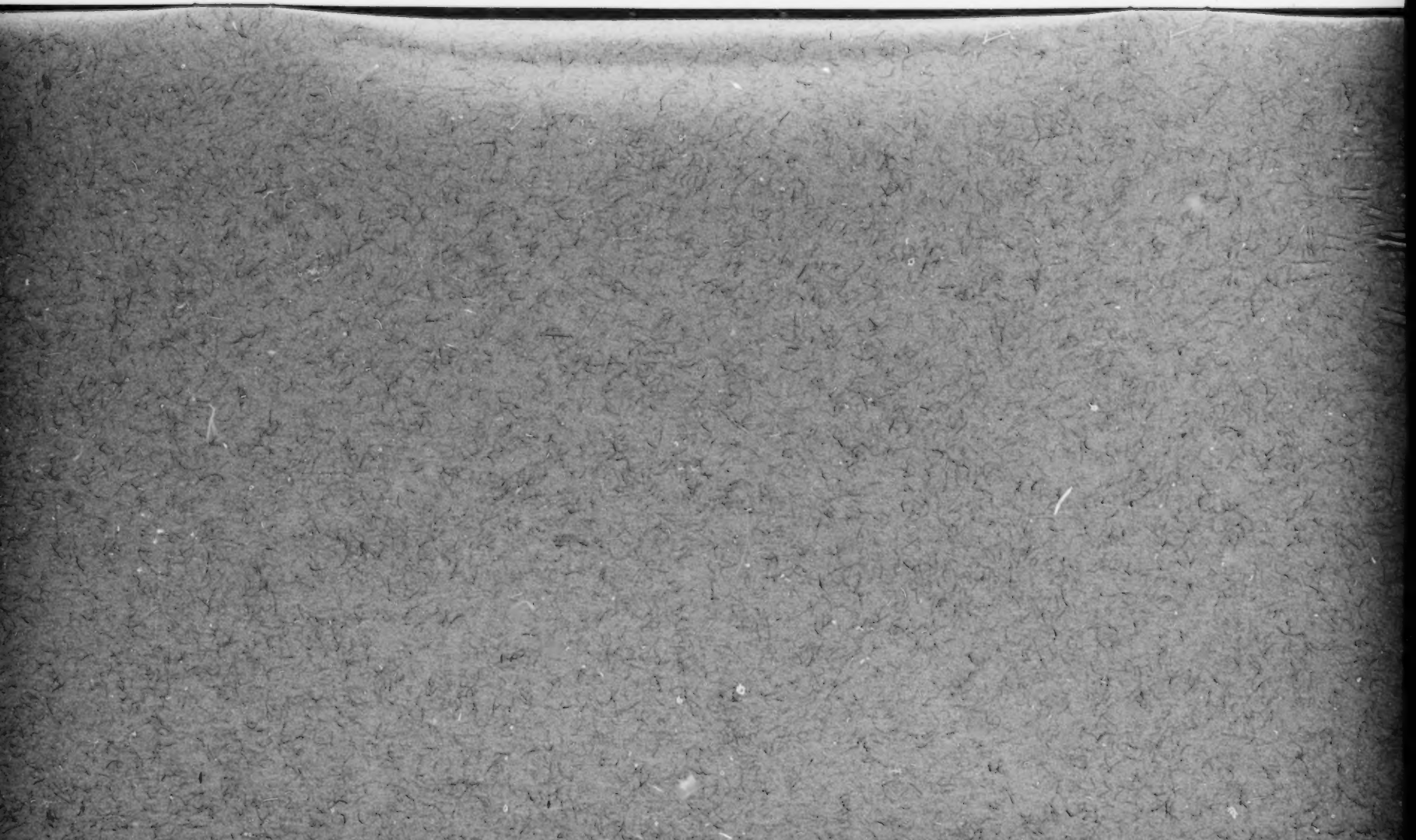
ROBERT P. DAVIS
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

STEVEN J. MANDEL
Counsel for Appellate Litigation

ELLEN L. BEARD
Attorney
Department of Labor
Washington, D.C. 20210

20pp



QUESTIONS PRESENTED

1. Whether respondent's motion to obtain restitutionary and prospective injunctive relief instead of the monetary relief awarded by the district court was properly characterized as a motion to alter or amend the judgment under Fed. R. Civ. P. 59(e).

2. Whether the court of appeals properly dismissed petitioner's appeal pursuant to Fed. R. App. P. 4(a)(4) because petitioner failed to file a notice of appeal after the district court denied respondent's motion to alter or amend the judgment.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-323

WELEX, A DIVISION OF HALLIBURTON COMPANY, PETITIONER

v.

ELIZABETH DOLE, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals dismissing the appeal (Pet. App. 26a) is unreported. The district court's 1982 order on cross-motions for partial summary judgment (App., *infra*, 21a), its November 29, 1988 final judgment (App., *infra*, 12a), and its December 16, 1988 memorandum and order denying respondent's motion to amend the judgment (Pet. App. 16a-17a) are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1989. A motion for reconsideration was denied on June 2, 1989 (Pet. App. 27a). The petition for a writ of certiorari was filed on August 25, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Secretary of Labor filed this action to enjoin petitioner from violating the overtime compensation provisions of the Fair Labor Standards Act of 1938 (FLSA or Act), 29 U.S.C. 201 *et seq.* Jurisdiction was alleged under Section 17 of the Act, 29 U.S.C. 217, which authorizes district courts "to restrain violations of Section 215 of this title, including * * * the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees." The Secretary alleged that petitioner had violated 29 U.S.C. 207 and 215(a)(2) by failing to pay certain employees for hours in excess of forty hours a week at a rate not less than one and one-half times their regular rate of pay. In its prayer for relief, the complaint specifically requested a permanent injunction against violation of these overtime pay provisions and "the restraint of withholding of payment of overtime compensation found by the court to be due employees under the Act," plus interest thereon. Complaint, Civ. Action No. V-79-19 (S.D. Tex. Sept. 17, 1979).

In its defense, petitioner argued that its pay plan fell within the so-called "*Belo*" exception to the Act's overtime compensation requirements, an exception derived from *Walling* v. *A.H. Belo Corp.*, 316 U.S. 624 (1942), and now codified at 29 U.S.C. 207(f). The district court held the *Belo* exception inapplicable, granting partial summary judgment to the Secretary on that issue in an order filed August 25, 1982 (App., *infra*, 2a). A bench trial then was held on November 22, 1988, focusing primarily on the issue of willfulness. See *McLaughlin* v. *Richland Shoe Co.*, 108 S. Ct. 1677 (1988); 29 U.S.C. 255(a). The court ruled from the bench that the violation was not willful (Tr. 58), and ordered petitioner to make "pass-due [sic] overtime payments of $120,667.47, which is the stipulated

figures for the two years back on the statute of limitation under the non willful, non reckless standard to the stipulated employees." Tr. 60-61.

On November 29, 1988, the district court entered final judgment for the Secretary, directing that she recover from petitioner for the benefit of 91 employees specified amounts of principal, prejudgment interest, and post-judgment interest (App., *infra,* 1a). On December 5, 1988, petitioner filed a notice of appeal in district court. Pet. App. 5a-7a; Pet. 2. One day later, on December 6, 1988, the Secretary filed a timely motion to alter or amend the judgment. Pet. App. 8a-15a; Pet. 2. Expressly relying on Rule 59(e), the Secretary argued that the court had erred both by entering a money judgment rather than a restitutionary injunction and by failing to enjoin petitioner permanently from violating the overtime provisions of the Act. Pet. App. 12a-14a.[1] By an order signed on December 13, 1988 and entered on December 16, 1988, the district court denied the Secretary's motion to amend the judgment (*id.* at 16a), explaining that "[t]he granting of only the compensatory monetary relief in the final judgment implicitly but unequivocally denied the other relief the Secretary of Labor requested," and that "injunctive relief was unsupported by any evidence of current practices or intentions." *Id.* at 17a.

2. After the district court denied the Secretary's Rule 59(e) motion, petitioner did not file a new notice of appeal. It did, however, file two other documents with the court of appeals, both dated December 13 and filed December 18, 1988. Pet. App. 18a, 20a; Pet. 2. One was a

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[1] Although the Secretary's motion twice referred erroneously to a date of June 13, 1988 as the date of the judgment (Pet. App. 8a, 12a), it also correctly referred to November 29, 1988 as the date of the judgment. *Id.* at 13a.

letter referencing the parties and district court civil action number and enclosing a receipt for payment of the filing fee to the district court as required by Fed. R. App. P. 3(e). Pet. App. 18a-19a. The other was a letter, again referencing the caption of the case below, and enclosing the Fifth Circuit's "Form for Appearance of Counsel," which identified Weiex as appellant and the Secretary of Labor as appellee. Pet. App. 21a-25a. Neither letter designated the "judgment, order or part thereof appealed from" (Fed. R. App. P. 3(c)) either by date or by description.

Accordingly, on March 16, 1989, the Secretary moved to dismiss the appeal on the ground that petitioner had failed to file a notice of appeal, as required by Fed. R. App. P. 4(a)(1) and (4), within 60 days of the district court's order denying the Secretary's motion to alter or amend the judgment. The Secretary emphasized that this requirement is jurisdictional under *Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56, 60-61 (1982) (per curiam). The court of appeals summarily dismissed the appeal, over petitioner's opposition. Pet. App. 26a; Pet. 3. Petitioner filed a motion for reconsideration, arguing for the first time that its December 18 filings with the court of appeals satisfied the requirements for a notice of appeal under Fed. R. App. 3(c). Pet. 3. That motion was denied. Pet. App. 27a.

ARGUMENT

The summary decision of the court of appeals to dismiss this appeal is correct and applies well-established principles to the particular facts of this case.

1. Rule 4(a)(4) of the Federal Rules of Appellate Procedure provides that, where any party files a timely motion in district court to alter or amend a judgment under Rule 59, Fed. R. Civ. P., "the time for appeal for all parties

shall run from the entry of the order" disposing of that motion. Rule 4(a)(4) (emphasis added) stipulates:

> A notice of appeal filed before the disposition of any of the above motions *shall have no effect.* A new notice of appeal *must be filed* within the prescribed time measured from the entry of the order disposing of the motion * * *.

This unequivocal language, added by the 1979 amendments to the Federal Rules of Appellate Procedure, was designed to "make it clear" that, when a notice of appeal is filed before one of the specified post-trial motions, "the appellant should not proceed with the appeal during pendency of the motion but should file a new notice of appeal after the motion is disposed of." Fed. R. App. P. 4(a)(4), notes of advisory committee on appellate rules (1979 Amendment) (28 U.S.C. App. at 469).

As this Court has held, "the post-1979 effect of a Rule 59 motion on a previously filed notice of appeal" is that " '[t]he appeal simply self-destructs.' " *Griggs* v. *Provident Consumer Discount Co.,* 459 U.S. at 61 (quoting 9 J. Moore, B. Ward, & J. Lucas, *Moore's Federal Practice* ¶ 204.12[1], at 4-65 n.17 (2d ed. 1982)). Under these circumstances, a previously filed notice of appeal has " 'no effect' " and is simply "a nullity." *Griggs,* 459 U.S. at 61. Because a timely notice of appeal is both mandatory and jurisdictional, without such a timely notice, the court of appeals has no jurisdiction to act. *Ibid.*

2. Petitioner recognizes that, under Rule 4(a)(4), a timely Rule 59(e) motion nullifies a previously filed notice of appeal. Pet. 3, 5. However, petitioner seeks to escape the consequences of neglecting to file a second notice of appeal by asking this Court to recharacterize both respondent's motion to alter and amend and its own appellate filings. These efforts are unpersuasive.

a. Petitioner argues (Pet. 7-9) that the Secretary's post-judgment motion, although clearly denominated a Rule 59(e) motion to alter or amend the judgment, was in reality a motion under Fed. R. Civ. P. 60(a) to correct the district court's clerical error in failing to "memorialize" part of its decision. Rule 60 motions, unlike 59(e) motions, do not affect the finality of a judgment for purposes of appeal, and do not nullify a previously filed notice of appeal under Fed. R. App. P. 4(a)(4). *Harcon Barge Co.* v. *D & G Boat Rentals, Inc.*, 784 F.2d 665, 666 (5th Cir.) (en banc), cert. denied, 479 U.S. 930 (1986); 9 J. Moore, B. Ward, & J. Lucas, *Moore's Federal Practice*, ¶ 204.12[1], at 4-79, 4-82 (2d ed. 1989). Rather, clerical mistakes may be corrected during the pendency of an appeal under specified conditions. See Fed. R. Civ. P. 60(a).

Petitioner's attempt to recast the Secretary's post-judgment motion is unavailing. The Secretary filed a Rule 59(e) motion to effect a substantive change in the judgment: to convert it from a money judgment to a judgment providing both a restitutionary injunction and a prospective injunction against future violations of the FLSA's overtime provisions. Pet. App. 8a, 12a-14a. A restitutionary injunction, providing for the restraint of any withholding of payment of past due overtime wages is, unlike a money judgment, enforceable through the court's contempt power. *Usery* v. *Fisher*, 565 F.2d 137 (10th Cir. 1977). A prospective injunction, of course, provides a ready remedy for future statutory violations. See, *e.g.*, *Walling* v. *James V. Reuter, Inc.*, 321 U.S. 671 (1944). The Secretary's motion, therefore, plainly sought significant and material changes in the remedy awarded by the district court for petitioner's violations of the FLSA, and thus was properly characterized by the Secretary and both courts below as a motion to alter or amend the judgment.

Moreover, because the motion involved a " 'reconsideration of matters properly encompassed in a decision on the merits' " (*Osterneck* v. *Ernst & Whinney,* 109 S. Ct. 987, 990 (1989), quoting *White* v. *New Hampshire Dep't of Employment Sec.,* 455 U.S. 445, 451 (1982)), it was properly filed as a Rule 59(e) motion to amend the judgment. Certainly the injunctive relief sought by the Secretary here was at least as closely related to full relief on the merits as was the prejudgment interest at issue in *Osterneck,* which the Court held was properly sought under Rule 59(e). Compare *Buchanan* v. *Stanships, Inc.,* 108 S. Ct. 1130 (1988) (per curiam) (motion for costs under Fed. R. Civ. P. 54(d) is collateral matter, not Rule 59(e) motion); *White* v. *New Hampshire Dep't of Employment Sec., supra* (motion for attorneys' fees is not Rule 59(e) motion).

Petitioner argues, however, that the Secretary's motion should have been treated as a Rule 60(a) motion because it purportedly asked the court simply to memorialize part of the ruling inadvertently omitted from its decision, as in *Miller* v. *Trans American Press, Inc.,* 709 F.2d 524, 527-528 (9th Cir. 1983). This argument is not plausible. The court in *Miller* explicitly distinguished the kind of "clerical error" (*id.* at 527) it perceived in that case from a request for a "substantive change of mind by the court" (*ibid.*) that must be characterized as a Rule 59(e) motion. Here, the Secretary unquestionably was requesting a "substantive change of mind by the court." Indeed, the Secretary's motion asked the court to *change* a monetary award to a restitutionary injunction, as well as to add a prospective injunction to the existing judgment. And the district court confirmed, in denying the Secretary's motion, that it had not inadvertently omitted injunctive relief, but that its prior order "implicitly but unequivocally" denied such relief. Pet. App. 17a. A motion to alter or amend was the

appropriate vehicle by which to challenge the correctness of the court's order limiting relief. Accordingly, the court of appeals properly characterized this motion as a Rule 59(e) motion to alter or amend the judgment.

b. Petitioner also contends (Pet. 4-7) that its two December 18 letters to the court of appeals—one including a form for appearance of counsel and the other a notice of payment of filing fee—constituted a valid second notice of appeal pursuant to Fed. R. App. P. 3(c). That rule requires that a notice of appeal "shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken." The rule also states that an appeal "shall not be dismissed for informality of form or title of the notice of appeal." Petitioner, focusing on this last sentence of Rule 3(c), describes its errors as "mistakes of mere form" which should not be fatal to its appeal. Pet. 4-5.

In fact, however, petitioner's December 18 filings demonstrate a more serious defect than mere form because they fail to designate the judgment appealed from as mandated by Rule 3(c). The substantive requirements for the content of a notice of appeal are jurisdictional in nature. See *Torres* v. *Oakland Scavenger Co.*, 108 S. Ct. 2405, 2409 (1988) ("construing Rule 3(c) as a jurisdictional prerequisite" and affirming dismissal of appeal by party whose name was inadvertently omitted from notice of appeal). See also *Osterneck*, 109 S. Ct. at 989 (noting "the vital fact" that respondent was omitted from the notice of appeal). Even if petitioner's appearance of counsel form is viewed as satisfying the first requirement of Rule 3(c) by "specify[ing] the party * * * taking the appeal" and the third requirement by "nam[ing] the court to which the appeal is taken," petitioner's December 18 filings did not meet Rule 3(c)'s second requirement that the notice of

appeal "shall designate the judgment, order or part thereof appealed from." As described above (pp. 2-3, *supra*), the district court had entered at least three separate orders or judgments in this case on different dates. Thus, mere recitation of the case caption did not adequately identify the "judgment, order or part thereof appealed from," as the rule requires. Accordingly, the December 18 filings relied on by petitioner were insufficient to constitute a new notice of appeal conferring jurisdiction on the court of appeals.[2]

Petitioner contends (Pet. 5-6) that the Fifth Circuit's decisions regarding the requirements of a notice of appeal are inconsistent with one another. However, neither in this case nor in any other case has the Fifth Circuit agreed that its decisions present an intra-circuit conflict. Instead, the Fifth Circuit has determined that the very decisions that petitioner claims are in conflict are actually in harmony.[3] See, *e.g.*, *Van Wyk El Paso Inv., Inc.* v. *Dollar Rent-A-Car Systems, Inc.*, 719 F.2d 806, 807-808 (5th Cir. 1983) (per curiam) ("We hold that even under the liberal constructions accorded the documents filed in *Cobb* [v. *Lewis*, 488 F.2d 41 (5th Cir. 1974)] and *Stevens* [v. *Heard*, 674 F.2d 320 (5th Cir. 1982) (per curiam)], Dollar Rent-A-Car has failed to give a timely notice of appeal."). Compare Pet. 5-6 (asserting that *Van Wyk* is in conflict with *Cobb* and *Stevens*).

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[2] In contrast to petitioner's December 18 submissions, Form 1 in the Appendix of Forms to the Federal Rules of Appellate Procedure, which is specifically referenced in Rule 3(c) as "a suggested form of a notice of appeal," calls for the appellant to specify that its appeal is from either a "final judgment" or from an "order (describing it)" and to note the date on which the judgment or order was entered.

[3] In any event, an intra-circuit conflict provides no basis for this Court's review. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

Petitioner also suggests that the District of Columbia Circuit "has taken a different view" (Pet. 6) from the Fifth Circuit. That contention is without merit. Both courts recognize that, when a notice of appeal has been nullified under Rule 4(a)(4), Rule 3(c) applies as if no notice of appeal had been filed at all. *Van Wyk El Paso Inv., Inc.*, 719 F.2d at 807; *Nichols* v. *Asbestos Workers Local 24 Pension Plan*, 835 F.2d 881, 888 (D.C. Cir. 1987). Moreover, both circuits recognize that the timely filing of a document will satisfy the requirements of Rule 3(c) as long as it accomplishes the three notice requirements of that rule. *Van Wyk El Paso Inv., Inc.*, 719 F.2d at 807; *Nichols*, 835 F.2d at 889. See also *Page* v. *DeLaune*, 837 F.2d 233, 236 (5th Cir. 1988) (filing of designation of record on appeal and timely service of notice of appeal on opponent satisfy Rule 3(c)).

Whether the notice requirements of Rule 3(c) have been met in a particular case is largely a factual question. Thus, in *Nichols*, the D.C. Circuit held that a certificate filed by appellants under Fed. R. App. P. 10(b)(1) "contain[ed] the data Federal Appellate Rule 3(c) necessitates for an efficacious notice of appeal" (835 F.2d at 888 (footnote omitted)) because, in addition to identifying the parties bringing the appeal and the court in which appellate review was sought, it adequately identified the judgment appealed from by describing it as the decision on cross-motions for summary judgment. *Id.* at 889. In *Van Wyk*, by contrast, the Fifth Circuit held that a form for appearance of counsel did not satisfy Rule 3(c) because it failed to indicate whether the party was appellant or appellee and did not refer to the order or judgment it intended to appeal. 719 F.2d at 808. In this case, similarly, the notice of appeal lacked the specificity about the "judg-

ment, order, or part thereof appealed from" which the D.C. Circuit explicitly found in *Nichols*.[4]

In sum, there is no conflict in the circuits and no reason for this Court to review the court of appeals' application of established principles to the facts of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Department of Labor

OCTOBER 1989

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[4] See also *Page* v. *DeLaune*, 837 F.2d at 236 (reviewing cases in which Fifth Circuit has found particular filings to be valid notices of appeal); *Greater Houston Chapter of ACLU* v. *Eckels*, 763 F.2d 180 (5th Cir.) (appeal information sheet fails to designate judgment, order, or part appealed from under Rule 3(c) and is not valid notice of appeal), cert. denied, 474 U.S. 980 (1985); *Alamo Chem. Transp. Co.* v. *M/V Overseas Valdes*, 744 F.2d 22 (5th Cir. 1984) (motion for enlargement of time to file appellate brief is not valid notice of appeal); *Florida Women's Medical Clinic, Inc.* v. *Smith*, 706 F.2d 1172 (11th Cir. 1983) (appellate brief is not valid notice of appeal).

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

Civil Action No. V-79-19

ANN MCLAUGHLIN, SECRETARY OF LABOR, PLAINTIFF

VS.

WELEX, DEFENDANT

[Filed Nov. 29, 1988]

FINAL JUDGMENT

It is adjudged that Ann McLaughlin, Secretary of the Department of Labor, recover from Welex for the benefit of the ninety-one employees in the class covered by the period October 1, 1977 through January 31, 1980:

A. $102,662.47 in principal;
B. $82,365.59 in prejudgment interest from January 1, 1980, at 9% per annum; and
C. postjudgment interest at 8.55% per annum.

Signed on November 22, 1988, at Houston, Texas.

/s/ LYNN N. HUGHES
Lynn N. Hughes
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

Civil Action No. V-79-19

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF

VS.

WELEX, A DIVISION OF THE HALLIBURTON CORPORATION,
DEFENDANT

[Filed Aug. 25, 1982]

ORDER

The Secretary of Labor (hereinafter "Secretary") brings suit to enjoin Welex Company, a division of the Halliburton Corporation, from allegedly violating the provisions of the Fair Labor Standards Act (hereinafter "FLSA"), as amended, 29 U.S.C. §§ 201, *et seq.*, and to restrain Welex from withholding payment of overtime compensation allegedly due its employees. Pending before the Court are cross-motions for partial summary judgment filed by Plaintiff and Defendant. Rule 56, Fed. R. Civ. P.

The FLSA requires employers to pay time and one-half an employee's regular rate of pay for all hours worked in

excess of forty in any workweek. The Act excepts, *inter alia*, pay plans pursuant to so-called "*Belo* contracts". Judicially recognized in *Walling* v. *A. H. Belo Corporation*, 316 U.S. 624 (1942) and *Walling* v. *Halliburton Oil Well Cementing Co.*, 331 U.S. 17 (1947), the exception was codified in 1949 at § 7(f) of the Act. 29 U.S.C. § 207(f). The *Belo* contract exception permits "an employer [to] pay his employees who work different hours each week a fixed guaranteed weekly salary, thus assuring employees stability of income and employment. The contracts may be used only if the duties of the employees necessitate irregular hours of work." *Foremost Dairies, Inc.* v. *Wirtz*, 381 F.2d 653, 655 n.3 (5th Cir. 1967), *cert. denied*, 390 U.S. 946 (1968), *quoting*, 95 CONG. REC. A5475 (1949). To qualify for this exception, employers must meet certain statutory prerequisites. The only prerequisite at issue in this case is whether the duties of Welex employees "necessitate irregular hours of work". *See* 29 U.S.C. § 207(f). For reasons stated below, the Court is of the opinion that Defendant fails to meet this condition and thus cannot invoke the *Belo* exception. Accordingly, Plaintiff's motion for partial summary judgment will be granted and Defendant's motion for partial summary judgment will be denied.

A motion for summary judgment shall be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), Fed. R. Civ. P.; *Keiser* v. *Coliseum Properties, Inc.*, 614 F.2d 406, 410 (5th Cir. 1980). The movant has the burden of proof, and any doubt as to the existence of material fact must be resolved against the moving party. *Id.* at 410. Further, exceptions to the FLSA are "to be narrowly construed against the employer as-

serting them." *Donovan* v. *Brown Equipment & Service Tools, Inc.*, 666 F.2d 148, 153 (5th Cir. 1982); *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *Wirtz* v. *Jernigan*, 405 F.2d 155, 158 (5th Cir. 1968). That precept applies to *Belo* plans, which qualify the Act's overtime provisions. *Id.* An employer who attempts to invoke the *Belo* exception "has the burden of showing affirmatively that each of the essential conditions to the exception are met." *Donovan* v. *Brown Equipment & Service Tools, Inc.*, 666 F.2d at 153; *Foremost Dairies, Inc.* v. *Wirtz*, 381 F.2d at 656 n. 4.

It is undisputed that the hours of Defendant's employees fluctuated in the overtime (over 40) range. The Fifth Circuit has conclusively held that if the fluctuation of hours in an employee's average workweek varies only in overtime hours, there is insufficient irregularity of hours to come within the *Belo* exception. Specifically,

> " 'irregular hours of work,' does not mean merely a fluctuating long workweek, consisting only or mostly of variations in the hours required over forty. For hours to be considered irregular within the meaning of section 7(f), they must, in a significant number of weeks, fluctuate both below forty hours per week as well as above, and *the fluctuation below must result from work requirements, not vacations, holidays, illness or reasons personal to the employees.*" (emphasis added).

Donovan v. *Brown Equipment & Service Tools, Inc.*, 666 F.2d at 154 (footnote and citations omitted); *Foremost Dairies, Inc.* v. *Wirtz*, 381 F.2d at 661; *Harp* v. *Continental/Moss-Gordin Gin Company*, 259 F. Supp. 198, 200 (M.D. Ala. 1966), *aff'd*, 386 F.2d 995 (5th Cir. 1967) (per curiam).

The sole issue in this case is whether the fluctuations below 40 hours per week resulting from work requirements were sufficient to constitute "irregular hours of work" within the meaning of § 7(f). The Government argues that the number of fluctuations below 40 hours were very few. It submitted an affidavit of Sammy Eugene Ray, a compliance officer with the U.S. Department of Labor. Mr. Ray states he analyzed the payroll records of Welex employees for the years 1977, 1978 and 1979. He further states that in order to determine how many workweeks fluctuated below forty hours due to work requirements, as mandated by the above cited authorities, he excluded workweeks fluctuating below forty hours due to initial and terminal weeks, vacation, illness or sick leave, holidays or bonus days off. Those exclusions are not challenged by the Defendant. What forms the basis for the present dispute is that the Government's calculations also excluded "scheduled days off." The parties have stipulated that the employees in question "are scheduled to be available for work five days per week with two days off. unless required to work more than five days because of customer-requirements." Fact Stipulation No. 10, Pre-Trial Order. Excluding weeks with scheduled days off, Mr. Ray concludes that out of 150 weeks below forty in 1977, only in one week or .01% of the weeks could the fluctuation be due to work requirements. Out of 388 weeks below forty in 1978, none or 0% could be so explained. Finally, out of 643 weeks in 1979, only two weeks or .01% of the total weeks could the fluctuation be considered due to work requirements. In other words, all but three weeks over a three-year period reflect a fluctuation of hours worked below forty which were not attributable to typical personal leaves (*e.g.*, vacation, illness, etc.).

Defendant asserts that its employees fluctuated below 40 hours in considerably more weeks than those calculated

by the Government. It submitted an affidavit from Stan Patterson, Senior Personnel Analyst at Halliburton Services at Duncan, Oklahoma. Mr. Patterson states that he analyzed the payroll records of Welex's employees for the same period covered by Mr. Ray, and prepared schedules showing the number of workweeks that fluctuated below 40 hours due to work requirements. Mr. Patterson's Schedule C, which, like Mr. Ray's schedule, was calculated in the manner specified by the *Brown* decision, indicates that 16.3% of workweeks were under 40 hours during 1977-1981. The yearly percentages shown were 5.9% in 1977, 12.8% in 1978, and 30.8% in 1979.[1] The significant difference between Mr. Patterson's calculations and schedules and those prepared by Mr. Ray is, as suggested earlier, that Mr. Ray has excluded any week under 40 hours in which an employee was allowed his scheduled two days off. To decide which schedule is correct, therefore, the Court must determine whether those weeks must be included in the calculation of irregularity of non-overtime hours necessary for the valid use of a *Belo* plan.

For fluctuations below 40 hours to be considered irregular within the meaning of the *Belo* and *Halliburton* exceptions, the employees must be required to work less than 40 hours because of an unpredictable irregularity inherent in the nature of their duties. *See Foremost Dairies, Inc.* v. *Wirtz*, 381 F.2d at 656 n.5. This is because one of the basic purposes of the exception is to protect employees against "short" paychecks due to a shortage or unavailability of work resulting in weeks of substantially fewer than forty

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[1] Patterson's yearly figures were the percentage of *net* workweeks (which excluded weeks under 40 hours due to initial and terminal weeks, illness and injury, vacations, etc.). As a percentage of *total* workweeks, Mr. Patterson's yearly percentages total 5.3% in 1977, 10.65% in 1978, and 26.5% in 1979.

work hours. *Donovan* v. *Brown Equipment & Service Tools, Inc.*, 666 F.2d at 154. In *Brown*, the court specifically stated that "days off" given at the employer's discretion were not work-related and were not the type of "irregularity" contemplated by the statute. *Id.* at 154. Defendant recognizes that the critical difference between its approach and that of the Plaintiff concerns the handling of those weeks where the employees were allowed to take their regularly scheduled two days off. Calling Plaintiff's position "absurd," Defendant strenuously argues that the Plaintiff would force employees to work a seven-day week before any employer would be "entitled to use a *Belo* contract". While superficially appealing, Defendant's argument misses the point. As stated above, the *Belo* contract is not an entitlement for the employer. Rather it is an exception to be narrowly construed. It is designed to cover a situation where because of the inherent nature of the job, an employee's work hours are "irregular", fluctuating between overtime weeks and short weeks. Implicit in Fifth Circuit decisions on the subject is the proposition that this fluctuation must be beyond the employer's control. *See Harp* v. *Continental/Moss-Gordin Gin Company, Inc.*, 259 F. Supp. 198, 200 (M.D. Ala. 1966), *aff'd* (per curiam), 386 F.2d 995 (5th Cir. 1967). In this case, it is undisputed that the scheduled days off are regularly assigned on a repeating three-week schedule, and the days off include all days of the week. There is no evidence and no contention that these days off are scheduled because of the absence of available work on those days. While these days off may indeed be an "enlightened employment practice", they are not the type of irregularity contemplated by the statute. *Brown*, 666 F.2d at 154. Indeed, adoption of the Defendant's argument could enable an employer to effectively manipulate "irregularity". For example, an employer could schedule days off during busy days some

weeks and then schedule the days off during slower days in other weeks, while requiring overtime work during the busy days.

Defendant's reliance on *Boll* v. *Federal Reserve Bank of St. Louis*, 365 F. Supp. 637 (E.D. Mo. 1973), *aff'd*, 497 F.2d 335 (8th Cir. 1974) is misplaced. In that case, a federal bank examiner was held to be properly paid under a *Belo* contract because of his irregular hours of work. By Defendant's reasoning, since most banks are open only five days a week, a bank examiner's workweek is analogous to that of field employees who are given their scheduled two days off (and therefore have a five-day workweek). Since *Boll* found the bank examiners' hours to be irregular, Defendant argues that its employees' regularly scheduled two days off should likewise be counted in determining irregularity. This Court does not reach that result from *Boll*.[2]

In *Boll*, an assistant bank examiner contended that because his employer established the schedule of banks to be examined at the beginning of each year and determined several months in advance which individuals were to examine particular banks, the hours of work varied from week to week at the discretion of the employer, and therefore the *Belo* exception was inapplicable. The court found § 778.405, 29 C.F.R. of the Department of Labor Interpretive Bulletin, which excludes from the calculation or irregular hours those weeks "where the employee works an irregular number of hours according to a predetermined schedule," to be a reasonable interpretation of the

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[2] Even if *Boll* could be read to support Defendant's position, this Court is bound by precedent established by the Fifth Circuit in *Foremost Dairies* and its progeny, which support the opposite conclusion.

Act. 365 F. Supp. at 644. It nevertheless denied the employee's claim:

> [W]hile the examination of banks was scheduled ahead of time, the number of hours that would be required to complete an examination was not known by the defendant. Although defendant would obviously know that the examination of a large bank would probably require more time than the examination of a smaller bank, the number of hours the assistant examiners would work during a particular examination could not be controlled by defendant nor could the number of hours they would work be anticipated with any degree of certainty. *Thus, the number of hours plaintiff worked per week were not the result of the discretion of defendant nor were they ascertainable from the schedule of the order in which the banks would be examined.* Plaintiff's duties necessitated irregular hour of work.

Id. at 645 (emphasis added). Unlike the employer in *Boll*, Defendant's scheduled two days off for its employees was the result of its discretion. The timing of the days off could be anticipated with reasonable certainty and, by Defendant's own admission, the days off fell at all days of the week irrespective of the work load.

In summary, the weeks under 40 hours in which an employee was allowed his scheduled two days off were properly excluded from Mr. Ray's calculations and schedules. These schedules show that only a very few weeks in 1977 to 1979 were fluctuations below 40 hours dictated by lack of work as opposed to being dictated by the employer's control of the work hours. Following the Fifth Circuit in *Donovan* v. *Brown Equipment & Service Tools, Inc.* and *Foremost Dairies, Inc.* v. *Wirtz*, this Court finds as a matter of law that Defendant failed to

show the kind of irregularity in non-overtime hours necessary for the valid use of a *Belo* plan. Accordingly, Plaintiff's motion for partial summary judgment is hereby GRANTED and Defendant's motion for partial summary judgment is hereby DENIED.

DONE at Laredo, Texas, this 23rd day of August, 1982.

/s/ George P. Kazen
United States District Judge

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